No. 11,638

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LOCAL 36 OF THE INTERNATIONAL FISHERMEN AND ALLIED WORKERS OF AMERICA, JEFF KIBRE, GILBERT ZAFRAN, CLIFFORD C. KENNISON, F. R. SMITH, GEORGE KNOWLTON, OTIS W. SAWYER, W. B. MCCOMAS, HARRY A. MCKITTRICK, ARTHUR D. HILL, C. LLOYD MUNSON, CHARLES MCLAUGHLAN, ROBERT M. PHELPS, BURT D. LACKYARD and RAY J. MORKOWSKI,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

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PETITION FOR REHEARING.

To Chief Judge William Denman and the Associate Judges of the Court of Appeals for the Ninth Circuit:

The appellants herein respectfully petition this Honorable Court to grant a rehearing of its decision filed herein on September 28, 1949, upon the following grounds:

I.

Preliminary Statement.

This petition will be limited to what appellants perceive to be the fundamental problems presented by the Court's opinion herein and their claims of error with respect thereto. By such limitation appellants do not waive or abandon any of the points presented in the appeal.

The length of this petition is explained by the fact that the opinion passes upon a matter which was not raised in the court below and which was not in any way presented by the parties on the appeal herein. In its opinion the Court severely censured counsel for appellants in a situation in which it is submitted there was no basis even for the slightest criticism of their conduct. Counsel have never heretofore been called upon or had an opportunity to discuss this matter.

II.

Coercive Tactics, Even by Non-members of Labor Unions, Are Not Covered by the Sherman Law. The Ends, Not the Means, Are the Sole Concern of the Federal Courts.

This Court has stated in its opinion (p. 9) that the written agreement which appellants required the dealers to sign was "innocuous upon its face." By its terms, no dealer was forbidden to deal with non-member fishermen,[1] and the latter were not excluded from the market in any way.[2]

However, this Court relies upon a distinction that appellants employed coercive tactics in compelling the dealers to sign this otherwise innocuous document. For the purposes of this petition it will be assumed arguendo that the appellants forcibly restrained non-member fishermen from going to sea until they agreed to withhold fish from non-cooperative dealers, and that similar restraints were applied to the customers, suppliers and carriers of the non-cooperative dealers. In other words, it will be assumed that the appellants excluded persons from the market for the purpose of getting a contract that would not exclude such persons.

Appellants again urge here as they did at the trial that these tactics, if true, may have been punishable by state law but that they do not constitute violations of the Federal Anti-Trust Laws. It is only the agreement itself,

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[1]This would have constituted a so-called "closed shop" provision of the kind held illegal in the *Hinton* case (34 Fed. Supp. 970), and the *Manaka* case (41 Fed. Supp. 53).

[2]Thus the written contract was of the "open shop" type allowed by the Court in *U. S. v. Columbia River Fishermen's Protective Assn.*, No. C-16087, D. C. District of Oregon (unreported). See page 13 of this Court's decision.

the final objective, that can support a conviction under the Sherman Act.

The opinion of this Court recognizes that coercive tactics are no longer regarded as restraints upon interstate commerce if engaged in by members of a labor union acting in pursuit of legitimate objectives (p. 15).

What this Court has failed to recognized is that the reason for the non-punishment of labor unions for such activities is not because they are specially exempted as unions by the Clayton or Norris-LaGuardia Acts, but because such acts are not in violation of the Sherman Act, no matter by whom committed.

It is true that this position was not always the rule applied by the Supreme Court. For decades labor unions argued in vain that they were specially exempted from the operations of the Sherman Act.

But the Act was consistently applied to unions almost immediately after the original passage of the law in 1890 (*U. S. v. Workingmen's Amalgamated Council,* 54 Fed. 994 and *U. S. v. Debs,* 64 Fed. 724); again in 1907 when they lost their homes and savings through the decision in the *Danbury Hatters* case (*Loewe v. Lawlor,* 208 U. S. 274, 52 L. Ed. 488), and again in 1921 and 1926 when the fruits of their legislative victory through passage of the Clayton Act in 1914 were taken away in *Duplex v. Deering,* 254 U. S. 443, 65 L. Ed. 349 and *Bedford Cut Stone Co. v. Journeymen Stone Cutters,* 274 U. S. 37, 74 L. Ed. 916, over the dissents of Justices Holmes and Brandeis.

In fact, labor's great court victory only came in 1940 when Chief Justice Stone in the case of *Apex v. Leader,* 310 U. S. 469, 84 L. Ed. 1311 expressly disregarded labor's arguments that the Sherman Act did not apply to it, and then proceeded to point out for the first time the

obvious truth that had previously escaped all of the earlier litigants, to-wit: that coercive activities are matters for State courts, not the Federal. He did not place the grounds for this distinction upon the fact that those engaged in such activities were members of a labor union. Rather, he held that the decision was applicable to industry and labor alike:

> ". . . *an impartial application of the Sherman Act to the activities of industry and labor alike* would seem to require that the Act be held inapplicable to the activities of respondents which had an even less substantial effect on the competitive conditions in the industry than the combination of producers upheld in the Appalachian Coals Case and in others on which it relied." (Emphasis added.) (310 U. S. 512-513, 84 L. Ed. 1334.)

The impact of the *Apex* decision upon the subsequent judicial treatment of the Sherman Act is best illustrated by what was said of this decision in the dissenting opinion of Mr. Chief Justice Hughes:

> "Whatever vistas of new uncertainties in the application of the Sherman Act the present decision may open, it seems to be definitely determined that a conspiracy of workers, *or for that matter of others,* to obstruct or prevent the shipment or delivery of goods in interstate commerce to fill the orders of the customers of a manufacturer or dealer is not a violation of the Sherman Act." (Emphasis supplied.) 310 U. S. 469, pp. 514-515, 84 L. Ed. 1335.

Petitioners respectfully submit therefore that this Court misconstrued the existing law when it stated in its opinion at page 20 that:

> "It is *only* that, in pursuit of a legitimate object of a laboring union, picketing and boycotting are not illegal." (Emphasis supplied.)

III.

The Sherman Act Is Only Concerned With Restraints of Commercial Competition Which Affect the Public Through Consumer Prices.

This Court stated the principle contended for by appellants at page 25 of its opinion as follows:

> "It is true likewise that the public interest is involved and the ultimate aim is to protect the purchasers and users of the product."

Appellants respectfully submit that in consistency with this principle this Court should have disapproved instead of approving at page 17 of the opinion the exclusion of appellants' offered testimony to the effect "that the price paid to fishermen bears no relation to the amount charged by fish dealers to consumers."

This testimony was the heart of appellants' defense. It is not necessarily based on the rule of reason but upon the new concept of the scope of the Sherman Law contributed to the law by the *Apex* decision.

In *Allen Bradley Co. v. Local Union No. 3, I. B. E. W.*, 325 U. S. 797, 801, 89 L. Ed. 1939, 1943-4, the Court noted that when the Sherman Act was adopted there were two views as to its purpose. The first was that the Act was aimed at "high consumer prices achieved through combinations looking to control of markets by powerful groups." The second view was that the Act applied to all combinations which interrupted the free flow of trade or tended to create monopolies. Initially the second view was accepted. This position of the Court met with vigorous opposition, leading to the adoption of the Clayton Act and the Norris-LaGuardia Acts. Then, citing the *Apex* case, the Court said:

> "The opinion in that case, however, went on to explain that the Sherman Act 'was enacted in the era of "trusts" and of "combinations" of businesses and of capital organized and directed to control of the market by suppression of competition in the marketing of goods and services, the monopolistic tendency of which had become a matter of public concern'; *that its purpose was to protect consumers from monopoly prices, and not to serve as a comprehensive code to regulate and police all kinds and types of interruptions and obstructions to the flow of trade.*" (325 U. S. 806, 89 L. Ed. 1946.) (Emphasis supplied.)

In *U. S. v. Universal Milk Bottle Service, Inc.,* 18 Law Week 2033, cited by this Court in its opinion (p. 19) it was pointed out that the effect on prices to consumers was the distinguishing allegation which made the indictment valid. The Court there said that the order under the Agricultural Act, relied upon by the defendants, only affected prices paid to producers and that there was nothing in the order or the Act itself which authorized or granted immunity for a conspiracy to fix prices of milk sold at retail or wholesale. The Court took pains to point out that it was this feature which distinguished the case from *U. S. v. French Bauer,* 48 Fed. Supp. 260, where an indictment was dismissed because it did not allege any effect upon consumer prices.

The Court of Appeals for the 8th Circuit, in *International Ladies Garment Workers v. Donnelly,* 147 F. 2d 246, 250, said, citing the *Apex* case:

> "Since there was no proof to show that the enjoined activities of the defendants, either in purpose or effect, tended to control the interstate market to the detriment of consumers, they were not proscribed by the Sherman Act."

IV.

Where a Price Fixing Agreement Does Not Violate the Sherman Act, a Combination to Obtain Such a Contract Does Not Violate the Law Even Though the Means Used to Achieve the Objective Consist of Strike Activities Which Interfere With Commerce.

In the *Apex* case the Supreme Court stated the issue as follows:

> "This Court has never applied the Act to laborers or to others* as a means of policing interstate transportation, and so the question to which we must address ourselves is whether a conspiracy of strikers in a labor dispute to stop the operation of the employer's factory in order to enforce their demands against the employer is the kind of restraint of trade or commerce at which the Act is aimed, even though a natural and probably consequence of their acts and the only effect on trade or commerce was to prevent substantial shipments interstate by the employer." (310 U. S. 487, 84 L. Ed. 1319.) (Footnote added.)

Here the issue is whether fishermen striking to obtain a contract not illegal under the Sherman Act (as the Court in its opinion assumes) who stop the operation of dealers' places of business in order to enforce their demand for such a contract, impose *"the kind of restraint* of trade or commerce at which the Act is aimed" even though there is a substantial interference with interstate commerce. It

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*Note that while the facts in the cited case involve "strikers in a labor dispute," the principles stated apply not only to such strikers, but to "laborers or others."

seems obvious that the restraint in this case is the same "kind" as that in the cited case. Here the object of appellants was to obtain a legal contract. In order to obtain it, they engaged in conduct which it is claimed had the effect of interfering with the free flow of commerce. The parallel with the *Apex* case is clear:

> "Here it is plain that the combination or conspiracy did not have as its purpose restraint upon competition in the market for petitioner's product. Its object was to compel petitioner to accede to the union demands and an effect of it, in consequence of the strikers' tortious acts, was the prevention of the removal of petitioner's product for interstate shipment." (310 U. S. 501, 84 L. Ed. 1327.)

If the purpose or effect of the combination was not to fix prices at the level of production, which the law permits, but was to fix them at the consumer level,* the problem would have been different. Then the combination might have been considered as directed toward an end illegal under the Sherman Act rather than one permitted by that law and the exemption therefrom under the Fishmens Marketing Act.

Here, assuming as the court does that the contract sought was itself valid, it follows that all of the fishermen in the area could have combined for the purpose of securing this agreement. If they had a right to do so, then they all could have voluntarily withheld their products un-

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*No evidence of such intent or effect was adduced. Petitioners' offer to prove the contrary was rejected.

til the agreement was reached—for if there was a right to secure the agreement, there was a right not to catch or sell fish except upon its consummation.

Undoubtedly such a withholding would have affected the flow of fish from the producer to the market. Such effect, however, would have been no more illegal than that caused by any producer who withholds his product from the market until he obtains the price he seeks.

Nor is it any answer to say here that a withholding by a combination is different from that of an individual producer. If a combination for marketing purposes is permissible, that combination must have the same power as the individual to withhold its products from the market until it secures an acceptable price. Otherwise, the combination is meaningless and ineffectual because it has no increased bargaining power as a result of the combination. The association of fishermen must have the same power to bargain for price as does the individual.

If such a combination might voluntarily withhold its products from the market, the only conceivable complaint here is the claim that the withholding was achieved by force or other improper means. But the anti-trust law is not concerned with these matters. It deals with the legality of the combination—not with the propriety of the means by which the combination is effectuated.

> ". . . The legislative history of the Sherman Act as well as the decisions of this Court interpreting it, show that it was not aimed at policing interstate trans-

portation or movement of goods and property." *Apex Hosiery Co. v. Leader, supra,* at 310 U. S. 490, 84 L. Ed. 1321.

". . . The Sherman Act is concerned with the character of the prohibited restraints and with their effect on interstate commerce. It draws no distinction between the restraints effected by violence and those achieved by peaceful but oftentimes quite as effective means. Restraints not within the Act, when achieved by peaceful means, are not brought within its sweep merely because, without other differences, they are attended by violence." *Apex Hosiery Co. v. Leader, supra,* at 310 U. S. 513, 84 L. Ed. 1334.

This lack of concern is not limited to labor unions. The Act does not deal with such "policing" regardless of the character of the organization involved. If voluntary co-operation to achieve a given result be not illegal under the Sherman Act, then attainment thereof by any other means does not run afoul that law.

What this Court has done in its opinion is to apply cases in which price fixing is illegal under the Sherman Act to a situation in which it is permitted. (At least the Court assumes such legality.) If in this case the legality of price fixing under the Sherman Act be conceded, the essential corner stone of the claimed violation is eliminated and the case against appellants must fall.

Restraints on competition are condemned precisely because of the resulting illegal effect upon or raising of prices:

". . . In the cases considered by this Court since the Standard Oil Co. Case in 1911 some form of restraint of commercial competition has been the *sine qua non* to the condemnation of contracts, combinations or conspiracies under the Sherman Act, and in general restraints upon competition have been condemned only when their purpose or effect was to raise or fix the market price. It is in this sense that it is said that the restraints, actual or intended, prohibited by the Sherman Act are only those which are so substantial as to affect market prices. Restraints on competition or on the course of trade in the merchandising of articles moving in interstate commerce is not enough, unless the restraint is shown to have or is intended to have an effect upon prices in the market or otherwise to deprive purchasers or consumers of the advantages which they derive from free competition." *Apex Hosiery Co. v. Leader, supra,* at 310 U. S. 500-1, 84 L. Ed. 1327.

Generally a combination in interstate commerce to raise prices violates the Anti-Trust law. Accordingly, any concerted action which affects prices is also a breach of that law—even though that result is achieved by restraints which have an indirect rather than a direct effect upon prices. Where, however, the combination to directly fix prices is legal, it cannot be a violation of the Anti-Trust Law to accomplish that legal objective by restraints direct or indirect—for in such a case, the ultimate restraint at which the law is aimed, *i. e.,* the fixing of prices, is not within the purview of the law.

The situation here can be compared to the following: A is charged with murder but it is found that he killed in self-defense. Nevertheless he is held guilty because intent to kill, one of the elements of the crime, was present. The combination of act plus intent do not constitute the crime in such a case, because the law has carved out the exception of self-defense. In the present case, we have a situation where ordinarily a restraint which affects market prices is illegal. But an exception has been carved out by the law giving fishermen the right to combine to fix market prices. Therefore, the alleged restraint which affects prices can no more be illegal than the killing in the cited example.

So in the *Apex Hosiery* case, the prevention of shipments was not a violation of the Anti-Trust law (whatever other laws may have been violated) because the fixing of wages, the end which the activity was designed to achieve, was not an illegal restraint. The same acts by a combination for the purpose of raising hosiery prices undoubtedly would have been contrary to the prohibitions of the anti-trust laws. Here the fixing of prices by a combination of fishermen is just as valid as was the fixing of wages in the *Apex Hosiery* case. Therefore, restraints upon commerce resulting from a strike to achieve that end (whatever other laws may allegedly be violated) are not contrary to the anti-trust law.

V.

The Decision Rendered Herein Holding That the Challenge to the Jury Panels Was Properly Overruled Conflicts With the Decisions of the Supreme Court on This Subject, and a Rehearing on This Point Should, Therefore, Be Granted.

1. The Challenge to the Jury Panels Did Not Go to the Jurisdiction of the Court. The Denial of the Challenge Did Not Deprive the Court of Jurisdiction but It Did Constitute Error Which May Be Corrected by the Judgment of This Court.

In the opinion herein it is stated that appellants' claim that the jury panel was drawn in a manner "so inherently defective and unfair that, even if a fair and impartial jury was obtained for this particular trial, still the cause must be reversed."[1] It is then stated that this seems to amount to a claim of "lack of jurisdiction" on the part of the trial court, and the conclusion is reached that "If this position is correct, the Court had no jurisdiction in any case, civil or criminal, tried by a jury. . . ." This conclusion does not conform with the law as declared by the Supreme Court.

The basis of the power to reverse on the ground that the challenge to the jury panels was improperly denied is not lack of jurisdiction of the trial court; it is the appellate court's "power of supervision over the administration of justice in federal courts." (*Thiel v. So. Pacific Ry. Co.*, 328 U. S. 217, 225, 90 L. Ed. 1181, 1187; *Faye v. New*

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[1]Appellants' position actually is, as the Supreme Court has held, that one of the essentials of a "fair and impartial jury" is that it be selected from a jury panel properly drawn. Therefore, as a matter of law, a jury selected from a defective panel is not fair and impartial.

York, 332 U. S. 261, 287, 91 L. Ed. 2043, 2059-60.) A reversal would amount to no more than action by the appellate court "to correct an error which permeated this proceeding." *Ballard v. United States,* 329 U. S. 187, 193, 91 L. Ed. 181, 186.

Obviously the power to correct an error is exercised by appellate courts only in cases in which the point is reserved in the trial court by appropriate motion or objection and is thereafter properly raised on appeal. A decision in this case on this point would affect only these particular appellants and those who hereafter challenge the jury panels. Additionally it would affect the future administration of justice and particularly the future method of selection of jury panels. It would advise the court below that it must eliminate those practices which this court itself found so inexplicable in view of the clear Supreme Court decisions prohibiting them.

2. Petitioners Were Not Required, in Support of Their Challenge to the Jury Panels, to Establish That They Were Personally Prejudiced by the Manner of Jury Selection.

In the opinion herein one of grounds for sustaining the judgment of the Court below is that the appellants established no prejudice or discrimination against them resulting from the method of jury selection. Appellants were not required to make any such showing.

In *Thiel v. So. Pacific Co., supra,* at 328 U. S. 219-220, 90 L. Ed. 1184, the challenge to the jury panel was based on the claim that there was discrimination in favor of "business executives or those having the employer's viewpoint . . . thus giving majority representation to one

class or occupation and discriminating against other occupations and classes, particularly the employees and those in the poorer classes. . . ."[2] The trial court found that five of the jurors finally selected "belong more closely and intimately with the working man and the employee class than they do with any other class." In the hearing before the Supreme Court it was claimed that the facts showed that petitioners in that case were not prejudiced and that, therefore, the challenge could not be considered. However, the Supreme Court disregarded the claim of lack of prejudice because, in a federal case in which the appellate court is exercising its supervisory power over the administration of justice, it is "unnecessary to determine whether the petitioner was in any way prejudiced." (*Thiel v. So. Pacific Ry. Co., supra,* at 328 U. S. 225, 90 L. Ed. 1187. See also: *Ballard v. United States,* 329 U. S. 187, 195, 91 L. Ed. 186.) The question of prejudice or lack thereof is equally immaterial in this case.

3. The Right to a Properly Selected Panel Is Separate and Distinct From the Right to an Impartial Jury. Appellants Were Entitled to Both.

In the opinion by this Court there is a quotation from the opinion of the trial judge in which, it is submitted, the matter of challenge to individual jurors is confused with the matter of selection of a panel of jurors. It is stated, in effect, that if an impartial jury is obtained, a party should not be allowed to complain even though the panel may have been improperly selected.

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[2]This challenge was sustained by the Supreme Court. In this case, however, appellants and counsel have been castigated by this court for making and trying to prove a similar challenge. This matter will be discussed further below.

The rule is, however, that a party is entitled to an "impartial jury drawn from a cross-section of the community." (*Thiel v. So. Pacific Ry. Co., supra,* at 328 U. S. 220, 90 L. Ed. 1184.) In other words, it is necessary, in the first instance, that the panel be selected according to the concept that it be a cross-section of the community, and it is from such a panel that an impartial jury must be drawn. If the panel is not selected in a manner calculated to attain a cross-section of the community, the error has been committed, regardless of what occurs thereafter. In this case, the challenge of the appellants went to the manner of selecting panel and not to the individual jurors who were chosen from that panel.

4. Appellants' Challenge Based Upon the Ground That the Jury Panels Were Not Selected in a Manner Calculated to Achieve a Cross-section of the Community Was Based Upon Democratic Principles and Was Not, as Is Asserted in the Opinion, an Attack on Democracy.

In sharp and passionate language the opinion condemns the challenge to the jury panels as an attack on demorcracy itself. The opinion goes so far as to say that by the challenge ". . . it is attempted to overthrow the jury system by the injection of concepts of class conflicts."

The opinion argues ardently for the proposition that a jury selected from the social register can render equal justice with a jury "drawn from the habitues of park benches." Yet, even in this opinion, it was found necessary to concede that the use of such lists drawn, for example, from "a women's social organization" is not proper. How these two propositions may be reconciled is not made clear.

This Court's defense of a jury composed entirely of socialites flies directly in the teeth of Supreme Court decisions. In the *Thiel* case, the court noted that discrimination against "those of low economic and *social* status" would "breathe life into any latent tendencies to establish the jury as an instrument of the economic and *socially* privileged." (Emphasis added.) Any tendency toward such discrimination was unequivocally condemned. 328 U. S. 223-4, 90 L. Ed. 1186.

It is significant that although the Supreme Court in all of its recent decisions has referred to the necessity that juries constitute a cross-section of the community, this court in its opinion ignores this phrase and this concept. It is true that the opinion includes a quotation from the trial judge stating that the requirements that a jury be a cross-section of the community "would seem not to be objectionable." But the Supreme Court of the United States has not limited itself to the proposition that the requirement of a cross-section is not objectionable; according to its rulings, *the effectuation of this concept is required.*[3]

Rather than attempting to overthrow the jury system by the "injection of concepts of class conflict," appellants seek to maintain the jury panel as a "body truly representative of the community"—as the Supreme Court has

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[3]The court states in its opinion that if appellants obtained their objective, "each citizen would have to be tried by members of his particular segment of the population." This statement of appellants' position is so much in conflict with everything that appellants have urged in their briefs and in the argument, that they are at a loss to understand it. It has always been appellants' position that an individual, be he Catholic, Mason, Jew, banker or bricklayer, is entitled to the same kind of a jury—a jury representative of the community—the exact opposite of a jury made up of "members of his own particular segment of the population."

said is required for "the proper functioning of the jury system, and, indeed, our democracy itself." It is the Supreme Court which has said that a jury must not be "the organ of any special group or class;" it is the Supreme Court which has condemned the methods of selection of jurors "which do not comport with the concept of the jury as a cross-section of the community." (*Glasser v. United States,* 315 U. S. 60, 85-86, 86 L. Ed. 680, 707. See also *Smith v. Texas,* 311 U. S. 128, 130, 85 L. Ed. 84, 86; *Thiel v. So. Pacific Ry. Co., supra.*)

In the *Thiel* case, the Supreme Court pointed out that to disregard these concepts "is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury"—this in a case in which, as noted above, the challenge to the method of selection was based upon the grounds that it resulted in the inclusion on the jury panel of too many "business executives or those having the employer's viewpoint" and discriminated against "other occupations or classes, particularly the employees and those in the poorer classes." It is submitted that it is the opinion of this Court of Appeals—not the position taken by the petitioners—which opens "the door to class distinctions and discriminations."

5. The Admittedly Improper Selection of Names From Special Private Sources Is in Itself a Sufficient Basis for Sustaining the Challenge to the Jury Panels.

The Court in its opinion concedes that the use of special lists was improper. It states, however, that the names drawn therefrom were an extremely small part of the total number of names used, that the names were largely selected from the telephone book, and that each name submitted by

the jury commissioner was balanced by one selected from the list of approximately 30,000 former jurors. The Court concludes that "the deviations here were comparatively minor and laid no field for the attack which has been made."

While holding that the deviations from a proper method of selection were "comparatively minor," the opinion gives no guidance whatsoever as to the distinction between improprieties "comparatively minor" and those comparatively major, the latter of which assumedly would constitute an appropriate basis for challenge. This issue of how substantial wrongful methods of selection must be before they will be stricken down is not an unimportant one. Nor is it one on which there is no authority. The Supreme Court has stated the rule:

> *"Tendencies, no matter how slight,* toward the selection of jurors by any method *other than a process which will insure* a trial by a *representative group* are undermining processes weakening the institution of jury trial, and *should be sturdily resisted."*[4] *Glasser v. United States, supra,* at 315 U. S. 86, 86 L. Ed. 707. (Emphasis added.)

Here there was admittedly more than a slight tendency; there was an actual deviation from proper practices which actual deviation, the opinion says, is "comparatively minor." Furthermore, here the jury commissioner has

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[4]Here, for such resistances, counsel have received the censure of this court. This matter will be discussed further below.

done precisely that which the Supreme Court has specifically condemned:

> "The deliberate selection of jurors from the membership of particular private organizations does not conform to the traditional requirements of a jury trial." *Glasser v. United States, supra,* at 315 U. S. 86, 86 L. Ed. 707.

This rule is not limited to situations in which all or a large part of the jury is so selected. It was followed in a case in which part of the jurors were selected from private organizations, and in that case the jury was characterized as "the organ of a special class." (*Glasser v. United States, supra* at 315 U. S. 87, 86 L. Ed. 708.) It is submitted that this Court while citing the *Glasser* case has not followed it.

Moreover, the opinion makes no analysis of this "comparatively minor" deviation. In the *Thiel* case, the Court noted as evidence of discrimination the fact that at least 50% of the jury list was composed of businessmen and their wives. (328 U. S. 222, 90 L. Ed. 1186.) Here, the showing is equally strong, if not stronger. The grand jury which returned the indictment contained no laborers, no working men, no representatives of those in the lower economic categories constituting considerably more than 50% of the population. Fourteen out of 19 of its members were in the general category of businessmen. On the panel from which the grand jury was selected 21 out of 33 were in this category. If the fact that 50% of the members of the panel were businessmen is deemed signifi-

cant in the *Thiel* case, why is the showing here "comparatively minor?"

The only complete specific testimony as to the sources from which the jurors were obtained covers the period from 1943 to 1947. But the evidence with respect to this period furnishes a good test of the composition of the entire jury panel because the testimony shows without contradiction that the method of selection used during the years 1943 to 1947 is typical of that used for the past 16-year period. In the period 1943-1947 the jury commissioner submitted a total of 6,712 names. Of these 1,680, or almost 25%, came from the society Blue Book.[5] This means that on an average jury, three out of twelve jurors would be specially selected socialites. It is submitted that this is hardly "comparatively minor" in a case in which a vote of one juror may spell the difference between conviction and failure to convict.

The fact that some names were taken from lists prepared prior to 1943 does not change the picture because the method used prior to 1943 is the same as that used thereafter. [Tr. pp. 2159-2160.] Therefore, the names selected from the accumulated cards were subject at least

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[5]Although this point is not discussed specifically or directly in the opinion, it is submitted that there is no difference in principle between selection of names from a social register and selection of names from a social club, for such selection in both instances has the effect of favoring the "economically and socially privileged" and thereby discriminating against "those of low economic and social status,"—which is the basis for the condemnation by the Supreme Court of any such selective selection.

to the same deficiencies as those selected from the list furnished by the jury commissioner during the period 1943-1947.

The foregoing leaves out of consideration the fact that additional names were considered taken from the Ebell Club, the Friday Morning Club and also an insurance company list of registered car owners. It also eliminates from consideration the question as to whether the telephone book as a source is itself representative of a community. At the very least, this Court should squarely face and analyze the facts with respect to the use of names from the society Blue Book and determine whether or not that constitutes such a "comparatively minor" deviation, as to permit such use to be continued. For critical as the Court is of the violations of Supreme Court decisions "at least in the letter," its opinion permits their continuance as "minor deviations." If the use of these lists is so erroneous that its discontinuance is required, then their use in this case was error and this case should be reversed. Only if such use is not so erroneous as to require its discontinuance, should the decision herein be allowed to stand. It is submitted that under the decisions of the Supreme Court, the continuance of the practice may not be tolerated and, therefore, this petition for rehearing should be granted.

VI.

The Censure of Counsel for Appellants Is Unwarranted and Grossly Unfair.

In a case in which there is not the slightest indication that the Trial Court or any of the parties considered that appellants' counsel were to the slightest extent guilty of misconduct and in which no question of misconduct was raised at any point in the proceedings before this Court, the opinion attacks counsel with a bitterness and vehemence hardly equalled in any case in which counsel was actually charged with contempt of court. It is asserted in the opinion that in the Trial Court there was an attempt by counsel to bring the administration of law into disrepute. It is stated that counsel engaged in "preposterous and outlandish tactics" amounting to an obstruction of justice, and counsel were censured.

All this without stating how, when or in what manner counsel so conducted themselves as to merit this serious reprimand—unless it be that the very presentation and the urging of the challenge to the jury panels is itself the subject of the attack.

All this in a case in which the opinion of this Court itself concedes that the matter was presented with "earnestness," and that there actually were departures from a proper method of jury selection which were "surprising." Yet the effect of the opinion is to leave the "surprising" violations in effect and to censure counsel who uncovered them.

All this in a case in which the trial judge is referred to as behaving with "conscientiousness" when, "faced with certain appellate expressions," he permitted a complete presentation of evidence and argument. Should counsel

for appellants have exercised less "conscientiousness" than the trial judge when they, *faced with the same appellate expressions,* presented and urged the challenge on behalf of their clients? What this Court considers "conscientiousness" on behalf of the trial court (and we believe correctly so) is condemned as an obstruction of the administration of justice on the part of counsel. The charged misconduct of counsel according to the opinion arises out of the fact that they presented the challenge "with tremendous force," with "earnestness" and with "circumstantiality." Ordinarily counsel are praised, as indeed they were by the trial court, for such devotion and zeal for the cause of their clients; here they are reprimanded.

All this in the face of the duties imposed upon an attorney by law and by the ethics of his profession to present vigorously on behalf of his clients all points of law and fact which he believes might be helpful to his client's cause.

> "A lawyer, when engaged in the trial of a case, is not only vested with the right, but under his oath as such officer of the court, is charged with the duty of safeguarding the interests of his client in the trial of an issue involving such interests. For this purpose, in a trial, it is his sworn duty, when the cause requires it, to offer testimony in behalf of his client or in support of his case in accordance with his theory of the case, to object to testimony offered by his adversary, to interrogate witnesses, and to present and argue to the court his objections or points touching the legal propriety or impropriety of the testimony or of particular questions propounded to the witnesses. If, in discharging this duty, he happens to be persistent or vehement or both in the presentation of his points, he is still, nevertheless, within his legiti-

> mate rights as an attorney, so long as his language is not offensive or in contravention of the common rules of decorum and propriety. As well may be expected in forensic polemics, he cannot always be right, and may wholly be wrong in his position upon the legal question under argument, and to the mind of the court so plainly wrong that the latter may conceive that it requires no enlightenment from the argument of counsel. But, whether right or wrong, he has the right to an opportunity to present his theory of the case on any occasion where the exigency of the pending point in his judgment requires or justifies it."—*Platnauer v. Superior Court,* 32 Cal. App. 463, 474-475.

Even if the trial court in this case had sought to restrict counsel in the presentation of this matter, it would have been counsels' right and duty nevertheless to urge their theory of the law. But what is remarkable about this court's censure in this case is that the matter was presented before a trial judge who indicated at all times that he wanted a full and complete record upon which to base his decision.

Counsel's original estimate of time for the presentation of direct testimony—excluding cross-examination—was two to three hours. [Tr. p. 1963.] The Government counsel said that they also had witnesses on the matter. [Tr. p. 1946.] The Court itself suggested that the jury be excused for a couple of days instead of just one day as suggested by counsel for appellants. [Tr. p. 1964.] As the matter was presented it took on greater proportions because of the developments of facts not all of which were known to the parties at the time that the hearing was commenced. The judge himself believed that there was suffi-

cient merit to the challenge to require a thorough exploration of all the facts. He constantly participated in the examination of witnesses and in many instances completely took over the examination for varying periods of time.[6]

Also remarkable is the fact that there were no hotly contested issues as to the admissibility of evidence. During the entire presentation of evidence by petitioners herein there were less than a dozen Government objections, most of which were overruled. [See: Tr. pp. 2008, 2014-15, 2154, 2229-30, 2285-95, 2299, 2331, 2367-8, 2373, 2484.] The trial judge himself indicated "there isn't any clear or definite or ascertainable or easily ascertainable standard as to what is relevant or material in such an inquiry . . .", and accordingly leaned toward the position that the inquiry should be broad in order to give the Court the most complete basis possible for its decision. [Tr. pp. 2520-2521.] In this connection, the trial judge himself called the Clerk of the Los Angeles County Superior Court as the Court's witness. [Tr. pp. 2190-2210.]

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[6]For example, the direct examination of one witness appears at Tr. 1968 to 2007 [All figures for pages are inclusive]. The court took over the examination of the witness for varying periods of time at Tr. pp. 1981-7, 1988-93, 1995-6, 1998-2001, or a total of 16 to 19 pages out of 40. In addition, he asked one or more questions on each of the following pages: Tr. 1972-7, 1980, 1997, 2006-7, or an additional 10 out of the 40 pages. There was further direct examination of the same witness at Tr. pp. 2009-2050. The Court took over the examination at Tr. pp. 2010-11, 2028-30, 2031-33, 2044-50, or a total of approximately 15 out of 42 pages. He asked one or more questions at pages 2012, 2017-21, 2026-27, 2034-36, 2038-41 and 2043, or an additional 16 out of 42 pages. An examination of the balance of the record will show that on direct examination by counsel of their witnesses, the trial judge conducted from 25% to 50% of the questioning.

The foregoing is stated not by way of criticism, direct or implied, of the trial judge. Rather it is set forth to show that the trial judge himself was interested in and participated in the full development of the facts.

The trial judge, who is highly praised in the opinion of this Court, never took the position that the contentions advanced by petitioners were entirely without basis. As a matter of fact in his opinion he said: "It is arguable that the Thiel case . . . established several other broad and far-reaching propositions which may be generally stated as follows:". He then set forth petitioners' contentions as he understood them. Thereafter he proceeded to hold against each of the contentions, *in each case,* however, referring to them as *"arguable contentions."* [Tr. pp. 2527-2533.] Thus, we have the situation here where counsel are castigated by the Appellate Court for advancing contentions deemed to be arguable by a trial judge, whom the Court in its opinion highly praises for his handling of the case.

Further the Trial Judge praised counsel for the manner in which the challenge was presented. Thus, in his opinion, he said:

> "Be it also said that counsel for the defendants, in support of their motion, instead of limiting their tactics to merely an attack upon the methods used, have very commendably sought to produce by evidence and in argument suggestions which were calculated to aid the officials of this court charged with the very difficult task of selecting jurors, to find a better way than the one under assault." [Tr. p. 2525.]

In addition there are portions of the typewritten transcript[7] in which the trial judge indicated his approval of the manner in which counsel handled the case. Thus, after all of the evidence was in, he said to one of appellants' counsel with respect to this:

> "I appreciate your approach to the argument. You have been of considerable help." [Typewritten Tr. p. 896.]

At the conclusion of argument by both sides, the trial judge said:

> "The Court: I am afraid I will not be able to come to a conclusion of this matter very rapidly. I have already given the matter a great deal of study, but I still have to work myself out of the woods. I appreciate the efforts counsel has put in on both sides. I think you have demonstrated what I indicated at the beginning, that you had acumen and industry." [Typewritten Tr. p. 1027.]

Thereafter, the trial judge continued the matter for approximately 12 days because he wanted to study it before rendering his decision. Just before continuing the matter from February 28 to March 12, 1948, he said:

> "I seriously want to thank all counsel on both sides for the magnificent efforts they have made and for the very great aid which you will have given me in this matter." [Typewritten Tr. p. 1159.]

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[7]These portions of the record were not included in the printed record because no issue had been raised as to the conduct of counsel. A certified copy of these portions of the record is being filed herewith.

Yet it is for such conduct this Court said:

> "The attempt, we believe, was to bring the administration of the law into disrepute. The preposterous and outlandish tactics of the defense amounted to an obstruction of justice in and of itself. Such tactics on the part of defense attorneys in our opinion deserves censure. We now pass it."**

In concluding on this point, the attention of the Court is directed to two matters: first, the effect of the Court's censure upon counsel themselves; and second, the effect upon the bar as a whole. With respect to the first, a permanent record is being made in which counsel upon the basis of the facts above set forth have been condemned by this Court before their profession and for the whole world to see. Years from now, political or other enemies of any of counsel can point to this opinion and utilize it as a basis for attacking their competency and integrity. Counsel would hardly be human if they did not feel strongly about this.

**Equally unfair and unsupported is the statement of this Court that counsel exhausted their peremptory challenges in order to place them in proper technical position to challenge the array, and asked for additional challenges "as a gesture." No basis is stated for this conclusion as to the intent of counsel and none there is in the record. Apparently the Court, having made the assumption that counsel acted in bad faith, that assumption is applied without factual support therefor. Counsel state without equivocation that these assertions in the opinion are without basis in fact, that counsel were not satisfied with the jury at any time, that they used their challenges in an attempt to eliminate the persons who were unsatisfactory to them, and that they finally went to trial before a jury which was not acceptable to them after their request for additional challenges was denied.

Second, and more important, however, is the effect on the bar. Whatever the outer limits of permissible advocacy may be—and it is not necessary to determine them here—they most assuredly embrace the presentation to federal courts of propositions enunciated in decisions of the Supreme Court of the United States and supported by facts independently proven.

The practice of law has indeed become a dangerous business if the censure here passed is allowed to stand. If such censure is to be imposed here, what can an attorney safely do in defending his clients? Must he ask himself first of all, "Does the trial court approve what I am doing and think that I am right in the position that I am advancing"? and second, "Even if the trial court thinks that what I am doing is proper, will an appellate court someday censure me because I have raised, fully presented and strenuously argued this point?" When such questions have to be asked by attorneys who are interested in protecting their reputation, a free, courageous bar can no longer exist.

Most of the landmark decisions have been rendered in cases handled by attorneys who recognized their obligations to their clients and their duty to fight for principles which they thought were or should be the law—even where trial judges sought to prevent the presentation of the points and even where intermediate appellate courts condemned the position presented as being untenable or absurd. This decision constitutes a barrier which only the

most devoted and most principled of lawyers will be able to surmount in order to continue the great contribution of the bar to our continually developing traditions and broadening concepts of such things as freedom, due process and fairness.

Conclusion.

In its opinion, the Court assumed the legality of the price fixing agreement sought by the fishermen, and held that this issue did not have to be decided. Yet the question as to the legality of that agreement goes to the very heart of this case. Appellants submit that upon further consideration of this matter it would become clear that the price fixing agreement was permissible under the terms of the Fishermen's Marketing Act and that a strike to secure such an agreement and the restraints upon commerce which flow from such a strike are no more the "kind" of restraints which violate the Sherman Act than are similar restraints resulting from strike activities by a labor union to secure a collective bargaining agreement.

With respect to the jury challenge it is submitted that the opinion incorrectly applies the leading Supreme Court cases on the point and that a correct application supports Petitioners' position. It is further submitted that the censure of counsel is unwarranted and unfair.

For all of the foregoing reasons it is respectfully submitted that a rehearing should be granted, that the decision of the court below should be reversed in all respects

and that the portions of the opinion censuring counsel should be stricken from the record.

Respectfully submitted,

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Certificate of Counsel.

I am one of the attorneys for the appellants. It is my judgment that this Petition for Rehearing is well founded and not interposed for delay.

ROBERT W. KENNY.